

United States District Court
Central District of California
Eastern Division

ANDREW HARBUT, *et al.*,
Plaintiffs,

v.

MONAVIE, INC., *et al.*,
Defendants.

ED CV 12-01983 TJH (DTBx)

Order

JS-6

The Court has considered Defendants' motions *in limine* to exclude (1) evidence of conduct by Juicy Acai, LLC and to dismiss claims brought under California law, and [Dkt. # 145] (2) Plaintiff's expert witness Michael Starnbach, Ph. D. and strike his expert witness reports, as well as Plaintiff's motions *in limine* to exclude [Dkt. # 137] (1) Defendants' expert witness Michael Greger, M.D. FACLM and strike his expert reports [Dkt. # 139] and, (2) certain evidence [Dkt. # 147], together with the moving and opposing papers.

Defendants' motions *in limine* to exclude evidence of conduct by Juicy Acai, LLC and to dismiss claims brought under California law

On March 8, 2017, Juicy Acai, LLC ["Acai"] was dismissed from this action.

1 Consequently, Defendants move to exclude evidence of conduct by Acai, “including
 2 any and all representations made by . . . Acai with respect to the juice products at issue
 3 in this case, on the ground that such evidence is irrelevant to the issues to be decided
 4 at trial.” Defendants note in their reply that Plaintiff concedes that Plaintiff “did not
 5 learn anything about ‘MonaVie’ juice on the . . . Acai website that he did not already
 6 know from reading the MonaVie website.” As such, Defendants are correct. Acai’s
 7 conduct is irrelevant because Acai’s conduct, including representations made on its
 8 website, do not have any tendency to make a fact of consequence more or less probable
 9 than it would be without the evidence. *See* Fed. R. Evid. 401.

10 Next, Defendants contend that, in light of Acai’s dismissal, the remaining
 11 California claims — claims under the Consumer Legal Remedies Act [“CLRA”], Cal.
 12 Civ. Code § 1750, *et seq.*, the False Advertising Law [“FAL”], Cal. Bus. & Prof.
 13 Code § 17500, *et seq.*, and the Unfair Competition Law [“UCL”], Cal. Bus. & Prof.
 14 Code § 17200, *et seq.* — are not cognizable. Although, as the parties note, motions to
 15 dismiss under the guise of a motion *in limine* are arguably improper, and certainly
 16 disfavored, the Court may treat such motions as motions for partial summary judgment
 17 where, as here, “the facts are not in dispute, and the question before the Court is purely
 18 legal.” *See Arcure v. California Dep’t of Developmental Servs.*, No. 143-cv-00541
 19 MJS (PC), 2016 WL 6248261, at *1 n.1 (E.D. Cal. Oct. 25, 2016).

20 Here, Plaintiff does not allege that any of the remaining Defendants engaged in
 21 conduct in the State of California. Under California’s presumption against the
 22 extraterritorial application of its laws, courts do not apply California law to the claims
 23 of non-resident parties based on conduct occurring outside of the state. *See Norwest*
 24 *Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222-25 (1999). Although “state
 25 statutory remedies may be invoked by out-of-state parties when they are harmed by
 26 wrongful conduct *occurring in California*,” *Gerstle v. Am. Honda Motor Co., Inc.*, No.
 27 16-CV-04384-JST, 2017 WL 2797810, at *3 (N.D. Cal. June 28, 2017) (emphasis
 28 added), such conduct is not alleged here. Accordingly, the remaining California claims

1 fail as a matter of law because the application of the CLRA, FAL, and UCL, in this
 2 case would involve the extraterritorial application of California law. *See Norwest*
 3 *Mortg., Inc.*, 72 Cal. App. 4th at 222-25.

4
 5 **Defendants’ motions *in limine* to exclude Michael Starnbach, Ph. D. and strike his expert**
 6 **witness reports**

7 The Court has broad latitude to perform a “gatekeeping” function in determining
 8 the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509
 9 U.S. 579, 597 (1993). Under Fed. R. Evid. 702, “[a] witness who is qualified as an
 10 expert . . . may testify in the form of an opinion or otherwise if[,]” *inter alia*, “the
 11 testimony is based on sufficient facts or data” and “the testimony is the product of
 12 reliable principles and methods[.]” The Court may exclude an expert’s opinion if it
 13 finds that the expert’s methodology in analyzing the data is unreliable. *Kumho Tire Co.*
 14 *v. Carmichael*, 526 U.S. 137, 153 (1999). Some factors the Court may consider are:
 15 whether the theory or technique involved can or has been tested, whether it has been
 16 subjected to peer review or publication, and whether it enjoys general acceptance in the
 17 relevant scientific community. *Daubert*, 509 U.S. at 593–95.

18 Dr. Starnbach’s report does not cite a single methodology, test, or paper to
 19 support his conclusions. Instead, the conclusions are based on — as Plaintiff notes in
 20 its opposition — Dr. Starnbach’s “education and years of experience as a scientist in the
 21 fields of microbiology, immunology, and infectious diseases.” Dr. Starnbach’s
 22 “education” and “experience,” however, are not sufficient in this case. Because
 23 education and experience — at least in this context — do not lend themselves to
 24 independent verification, such basis fails to meet Plaintiff’s burden “to show that the
 25 expert’s findings are based on sound science” — that is, “some objective, independent
 26 validation of the expert’s methodology.” *Daubert v. Merrell Dow Pharm., Inc.*, 43
 27 F.3d 1311, 1316 (9th Cir. 1995) [*“Daubert II”*].

28 On the other hand, under Fed. R. Evid. 702, an expert witnesses may testify to

1 general principles without reference to the facts of the case. Fed. R. Evid. 702,
 2 Advisory Committee's Notes (2000). Per Rule 702's committee notes, such testimony
 3 is proper where "(1) the expert [is] . . . qualified; (2) the testimony address[es] a
 4 subject matter on which the factfinder can be assisted by an expert; (3) the testimony
 5 [is] . . . reliable; and (4) the testimony "fit[s]" the facts of the case." The Court does
 6 not decide, and the parties do not appear to dispute, that Dr. Starnbach is qualified.
 7 Thus the Court assumes, without deciding, that Dr. Starnbach is qualified. Further, the
 8 remaining three elements appear to be met.

9 Therefore, Defendants' motion *in limine* to exclude Dr. Starnbach and his expert
 10 report will be granted. However, Dr. Starnbach will be allowed to testify as an expert
 11 regarding "general principles testimony without substantive connection to the facts of
 12 . . . [the] case." *See Emblaze Ltd. v. Apple Inc.*, 52 F. Supp. 3d 949, 961 (N.D. Cal.
 13 2014).

14
 15 **Plaintiff's motion *in limine* to exclude Defendants' expert witness Michael Greger, M.D.**
 16 **FACLM and strike his expert reports**

17 Plaintiff moves to exclude Defendants' expert witness, Dr. Greger, because his
 18 "methodology is unreliable and untrustworthy." Unlike Plaintiff's expert reports,
 19 however, Defendants' expert reports contain independently verifiable methodology,
 20 such as an analysis of certain scholarly articles and includes citations to the articles
 21 relied upon. Consequently, Defendants have met their burden to establish the expert
 22 opinion testimony's reliability. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
 23 1134, 1141 (9th Cir. 1997). Therefore, Plaintiff's motion *in limine* to exclude Dr.
 24 Greger and strike his expert reports will be denied.

25
 26 **Plaintiff's motion *in limine* to exclude certain evidence**

27 Plaintiff moves to exclude an unspecified "multitude of exhibits" and "[o]ther
 28 documents" proposed in the parties' Joint Exhibit List because, Plaintiff argues, such

1 evidence is, *inter alia*, irrelevant, inadmissible under Fed. R. Evid. 403, and not
2 authenticated. As such the motion fails to specify which exhibits, documents, or parts
3 thereof that Plaintiff seeks to exclude. Consequently, the motion fails, *inter alia*, to
4 “state with particularity the grounds for seeking the order” as required by Fed. R. Civ.
5 P. 7(b)(1), and fails to comply with Local Rule 7-5’s requirement that moving papers
6 be “complete.” Accordingly, Plaintiff’s motion to exclude certain evidence will be
7 denied.

8
9 **Plaintiff’s motion to transfer this case to the United States District Court for the District**
10 **of Utah, Central Division, pursuant to 28 U.S.C. § 1404(a)**

11 Following the dismissal of Acai on March 8, 2017, and the Court’s dismissal of
12 Plaintiff’s CLRA, FAL, and UCL claims in this Order, only one remaining fact
13 connects the instant case to the State of California — that Plaintiff alleges that he
14 purchased one item from Acai’s website. All remaining parties, all remaining claims,
15 and all remaining alleged conduct occurred outside of California.

16 On June 23, 2017, the Court denied Plaintiff’s motion to transfer this case to the
17 United States District Court for the District of Utah, Central Division, pursuant to 28
18 U.S.C. § 1404(a) [“Motion to Transfer”]. Thus, in light of the foregoing, the Court
19 has reconsidered Plaintiff’s Motion to Transfer. Accordingly, in the interest of justice,
20 the Court will grant Plaintiff’s Motion to Transfer.

21
22 Accordingly,

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24 **It is Ordered** that Defendants’ motion *in limine* to exclude evidence of conduct
25 by Acai be, and hereby is, **Granted**.

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27 **It is Further Ordered** that Defendants’ motion *in limine* to dismiss the CLRA,
28 FAL, and UCL claims shall be deemed a motion for partial summary judgment, and,

1 as such, be, and hereby is, **Granted**.

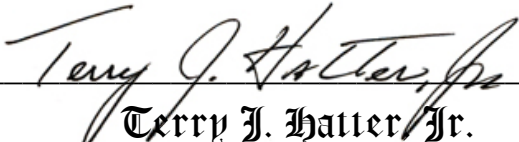
2
3 **It is Further Ordered** that Defendants' motion *in limine* to exclude Plaintiff's
4 expert witness Michael Starnbach, Ph. D. and strike his expert witness reports be, and
5 hereby is, **Granted**. However, Dr. Starnbach will be allowed to testify regarding
6 general principles testimony without substantive connection to the facts of the case.

7
8 **It is Further Ordered** that Plaintiff's motion *in limine* to exclude Defendants'
9 expert witness Michael Greger, M.D. FACLM and strike his expert reports be, and
10 hereby is, **Denied**.

11
12 **It is Further Ordered** that Plaintiff's motion *in limine* to exclude certain
13 evidence be, and hereby is, **Denied**.

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15 **It is Further Ordered** that this case be, and hereby is, **Transferred** to the
16 United States District Court for the District of Utah, Central Division.

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19 Date: July 10, 2017

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21 **Terry J. Hatter, Jr.**
22 **Senior United States District Judge**
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